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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 NATALIE ANDERSON,

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Deputy
10 Commissioner of Social Security for
11 Operations,

12 Defendant.

CASE NO. C18-5026 BHS

ORDER REVERSING AND
REMANDING DENIAL OF
BENEFITS

13
14 **I. BASIC DATA**

15 Type of Benefits Sought:

16 () Disability Insurance

17 (X) Supplemental Security Income

18 Plaintiff's:

19 Sex: Female

20 Age: 47 at the time of alleged disability onset

21 Principal Disabilities Alleged by Plaintiff: Back spasms; anxiety; severe knee pain;
22 fibroid pain/issues. AR at 75.

Disability Allegedly Began: May 7, 2013

Principal Previous Work Experience: Cleaner, housekeeping; telephone solicitor; fast
food worker; and cashier.

Education Level Achieved by Plaintiff: High school diploma with some college

1 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

2 Before ALJ:

3 Date of Hearing: August 10, 2016

4 Date of Decision: November 28, 2016

5 Appears in Record at: AR 17-45

6 Summary of Decision:

7 The claimant has not engaged in substantial gainful activity since
8 August 15, 2014, the application date (20 C.F.R. § 416.971, et seq.);

9 The claimant has the following severe medically determinable
10 impairments: depression; personality disorder; somatoform disorder;
11 morbid obesity; mild degenerative joint disease of the knees; and mild
12 degenerative disc disease of the lumbar spine (20 C.F.R. § 416.920(c));

13 The claimant does not have an impairment or combination of
14 impairments that meets or medically equals the severity of one of the listed
15 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
16 416.920(d), 416.925 and 416.926);

17 After careful consideration of the entire record, the Administrative
18 Law Judge (“ALJ”) found that the claimant has the residual functional
19 capacity to perform light work as defined in 20 C.F.R. § 416.967(b), except
20 she can occasionally stoop, kneel, crouch, crawl, and climb ramps or stairs.
21 She can never climb ladders, ropes, or scaffolds. She cannot work with the
22 general public. She can work in proximity to coworkers, but does better
with solitary work tasks, and should not perform work involving
collaborative decision-making with coworkers or teamwork situations. She
can make occasional adaptation to changes in work settings.

 The claimant is capable of performing past relevant work as a
cleaner, housekeeping. This work does not require the performance of
work-related activities precluded by the claimant’s residual functional
capacity (20 C.F.R. § 416.965);

 The claimant has not been under a disability, as defined in the Social
Security Act, since August 14, 2014, the date the application was filed (20
C.F.R. § 416.920(f)).

1 Before Appeals Council:

2 Date of Decision: December 6, 2017

3 Appears in Record at: AR 1-6

4 Summary of Decision: Denied review.

5 **III. PROCEDURAL HISTORY—THIS COURT**

6 Jurisdiction based upon: 42 U.S.C. § 405(g)

7 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

8 **IV. STANDARD OF REVIEW**

9 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's
10 denial of Social Security benefits when the ALJ's findings are based on legal error or not
11 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
12 1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than
13 a preponderance, and is such relevant evidence as a reasonable mind might accept as
14 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
15 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
16 determining credibility, resolving conflicts in medical testimony, and resolving any other
17 ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
18 While the Court is required to examine the record as a whole, it may neither reweigh the
19 evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278
20 F.3d 947, 954 (9th Cir. 2002). "Where the evidence is susceptible to more than one
21 rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion
22 must be upheld." *Id.*

V. EVALUATING DISABILITY

The claimant, Natalie Anderson (“Anderson”), bears the burden of proving she is disabled within the meaning of the Social Security Act (“Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. § 416.920. The claimant bears the burden of proof during steps one through four. *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five, the burden shifts to the Commissioner. *Id.*

VI. ISSUES ON APPEAL

Whether the ALJ properly evaluated the opinion of Mary Lemberg, M.D.;

Whether the ALJ properly evaluated the opinion of John Robinson, Ph.D.

VII. DISCUSSION

A. The ALJ Did Not Err in Evaluating Mary Lemberg, M.D.'s Opinions

Dr. Lemberg examined Anderson on November 24, 2014. AR at 335. Dr. Lemberg noted reviewing a medical record from April 2014 indicating a history of sleeping disorder and grief over the murder of Anderson's son in 2006. *Id.* She also noted reviewing a function report, but did not identify the date of that report. *Id.*

Dr. Lemberg performed a mental status exam and intellectual functioning tests. *See id.* at 338-39. Dr. Lemberg noted that Anderson "sobbed throughout most of the interview with variable intensity, and went from pacing to sitting to lying down on the floor. *Id.* at 338. Dr. Lemberg noted that Anderson failed most of the intellectual functioning tests. *See id.* at 338-39. For example, Anderson could not recall any of three objects in five minutes; stated that she could not spell "world" backwards; responded "I have no idea" to questions such as how apples and oranges are similar; and needed several basic questions repeated to her. *Id.*

Dr. Lemberg diagnosed Anderson with major depressive disorder, recurrent and severe, without psychotic features; somatic symptom disorder with predominant pain; and "other specified personality disorder, mixed personality features." *Id.* at 340. Dr. Lemberg further noted a rule-out diagnosis of posttraumatic stress disorder. *Id.*

Based on the examination and diagnoses, Dr. Lemberg opined that Anderson "does not have the ability to sustain simple and repetitive tasks, and would be incapable of completing detailed and complex tasks." *Id.* at 340. Anderson "cannot appropriately adapt to new environments," and "has never been able to maintain appropriate

1 interpersonal relationships in work or personal environments.” *Id.* Dr. Lemberg
2 concluded that Anderson “cannot perform work activities on a consistent basis due to her
3 psychiatric conditions.” *Id.*

4 The ALJ gave little weight to Dr. Lemberg’s opinions because she found that they
5 were “grossly inconsistent with the overall medical evidence” in the record. *Id.* at 38-39.
6 In particular, the ALJ determined that Dr. Lemberg’s observations (1) were inconsistent
7 with Anderson’s daily activities; (2) were inconsistent with the medical record; and (3)
8 relied too heavily on Anderson’s subjective complaints, which were not reliable. *Id.*

9 Where the ALJ rejects the opinion of an examining doctor, even if it is
10 contradicted by another doctor, the ALJ must provide “specific and legitimate reasons
11 that are supported by substantial evidence in the record” for rejecting the opinion. *Lester*
12 *v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews*, 53 F.3d at 1042). The
13 ALJ can satisfy this requirement “by setting out a detailed and thorough summary of the
14 facts and conflicting clinical evidence, stating his interpretation thereof, and making
15 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881
16 F.2d at 751). The court may also draw “specific and legitimate inferences from the
17 ALJ’s opinion.” *Magallanes*, 881 F.2d at 755.

18 The ALJ adequately explained her decision to reject Dr. Lemberg’s opinion here.
19 First, the record supports her determination that Dr. Lemberg’s opinion was inconsistent
20 with Anderson’s daily activities. Anderson reported to Dr. Lemberg that she lies in bed
21 all day and does not engage in any household responsibilities. *See* AR at 38, 339. Yet
22 evidence in the record indicated that Anderson “was taking care of her grandchildren and

1 performing daily household responsibilities during this time.” *Id.* at 38; *see id.* at 234-35,
2 635, 861.

3 Second, the record supports the ALJ’s conclusion that Dr. Lemberg’s observations
4 were inconsistent with the overall medical evidence. Dr. Lemberg reported far more
5 intense cognitive deficits than Anderson showed during regular visits with her counselors
6 and other health care providers. *See* AR at 38, 388, 447-48, 450-51, 453-54, 457. Less
7 than a week before her appointment with Dr. Lemberg, Anderson denied suffering from
8 depression, anxiety, or suicidal ideations, yet Dr. Lemberg observed that Anderson had
9 “severe” depression. *See id.* at 317-18, 340.

10 The ALJ further noted that Anderson “received spotty mental health treatment,
11 and her mental health symptoms actually improved and stabilized when she was
12 compliant with taking her medications.” *Id.* This was a rational interpretation of the
13 evidence, which the Court will not disturb. *See Thomas*, 278 F.3d at 954. Anderson
14 denied having depression or anxiety, or was reported as stable on her medications
15 multiple times between May 1, 2014 and October 22, 2015. *See* AR at 29, 34, 317-18,
16 421, 431, 452-53, 724.

17 The ALJ’s rejection of Dr. Lemberg’s opinion because of its reliance on
18 Anderson’s self-report stands on shakier ground. An ALJ may justifiably discount an
19 examining doctor’s opinions if they “are based ‘to a large extent’ on an applicant’s self-
20 reports and not on clinical evidence, and the ALJ finds the applicant not credible.”
21 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (quoting *Tommasetti v. Astrue*,
22 533 F.3d 1035, 1041 (9th Cir. 2008)). But an ALJ must tread carefully in the mental

1 health context. Psychiatric evaluations “will always depend in part on the patient’s self-
2 report” because “unlike a broken arm, a mind cannot be x-rayed.” *Buck v. Berryhill*, 869
3 F.3d 1040, 1049 (9th Cir. 2017) (internal quotation marks omitted) (quoting *Poulin v.*
4 *Bowen*, 817 F.2d 865, 873 (D.C. Cir. 1987)). “Thus, the rule allowing an ALJ to reject
5 opinions based on self-reports does not apply in the same manner to opinions regarding
6 mental illness.” *Buck*, 869 F.3d at 1049. Furthermore, clinical interviews and mental
7 status exams, “are objective measures and cannot be discounted as ‘self-report.’” *Id.*

8 The Court need not decide whether the ALJ erred in rejecting Dr. Lemberg’s
9 opinions as too heavily based on Anderson’s self-report, though, because any error in
10 including this reason was harmless. *See Baker v. Berryhill*, 720 F. App’x 352, 356 (9th
11 Cir. 2017) (finding harmless error where the ALJ stated erroneous reasons for
12 discounting examining psychologist’s opinion because the ALJ also included specific and
13 legitimate reasons); *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th
14 Cir. 2008). The ALJ therefore did not harmfully err in giving little weight to Dr.
15 Lemberg’s opinions.

16 **B. The ALJ Erred in Evaluating John Robinson, Ph.D.’s Opinions**

17 Dr. Robinson is a state-agency consultant who submitted an opinion to Disability
18 Determination Services on February 9, 2015. AR at 101-03. Dr. Robinson opined,
19 among other things, that Anderson was moderately limited in her ability to complete a
20 normal workday and week without interruptions from psychologically-based symptoms.
21 *Id.* at 102. He explained that “[d]espite waxing and waning symptoms, [Anderson]
22 would be capable of sustaining [concentration, persistence, and pace] for [simple, routine

1 tasks]. [H]er [mental health symptoms] will also cause intermittent issues w[ith]
2 attendance.” *Id.*

3 The ALJ noted that Dr. Robinson’s opinion was “generally consistent with the
4 medical evidence of record” discussed earlier in the decision. *Id.* at 39. Comparing Dr.
5 Robinson’s opinion to that of state-agency consultant Michael Regets, Ph.D., the ALJ
6 gave Dr. Robinson’s opinion greater weight because he had reviewed more records. *Id.*

7 The ALJ erred in her treatment of Dr. Robinson’s attendance limitation opinion.
8 Despite giving weight to Dr. Robinson’s opinion, the ALJ failed to discuss his attendance
9 limitation. This failure to discuss Dr. Robinson’s attendance limitation or provide
10 reasons for rejecting it was error. *See Clarke v. Berryhill*, 694 F. App’x 577, 578 (9th
11 Cir. 2017) (holding that the ALJ erred by failing to discuss a non-examining
12 psychologist’s opinion because the court could not determine whether the ALJ
13 considered that opinion, as required). Furthermore, an ALJ must account for all of the
14 claimant’s limitations when crafting the RFC. *See Valentine*, 574 F.3d at 690. Here, the
15 ALJ simply ignored part of Dr. Robinson’s opinion, and thus erred.

16 The root of the problem is that Dr. Robinson’s attendance limitation opinion is
17 ambiguous, and the ALJ failed to resolve that ambiguity. “In Social Security cases the
18 ALJ has a special duty to fully and fairly develop the record and to assure that the
19 claimant’s interests are considered.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.
20 1983) (citing *Thomas v. Schweiker*, 665 F.2d 936, 941 (9th Cir. 1982)). The duty to
21 develop the record beyond the medical records themselves is triggered “when there is
22 ambiguous evidence or when the record is inadequate to allow for proper evaluation of

1 the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (citing
2 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)).

3 Here, Dr. Robinson did not explain what Anderson’s “intermittent” attendance
4 issues are. *See* AR at 102. The vocational expert testified that employers would not
5 tolerate an employee who misses more than one day of work per month. AR at 72.
6 Comparing Dr. Robinson’s opinion to the vocational expert’s testimony, neither the ALJ
7 nor the Court has any basis on which to determine whether Anderson’s attendance issues
8 would render her unemployable. As a result, the ALJ’s determination that Anderson
9 could perform her past work, and was therefore not disabled, was not supported by
10 substantial evidence in the record.

11 The ALJ’s failure to resolve this issue goes to the heart of the disability
12 determination, and must be considered harmful. *See Stout v. Comm’r, Soc. Sec. Admin.*,
13 454 F.3d 1050, 1055 (9th Cir. 2006) (holding that an error is not harmless unless it is
14 “inconsequential to the ultimate nondisability determination”). The Court will therefore
15 remand this matter for further administrative proceedings under sentence four of 42
16 U.S.C. § 405(g). *See McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002)
17 (holding that remand for further proceedings is the appropriate remedy where additional
18 proceedings can remedy defects in the original administrative proceedings).

19 On remand, the ALJ must reevaluate Dr. Robinson’s opinion, and reassess the
20 RFC, as well as the conclusions at steps four and five of the disability determination
21 process.
22

1 **VIII. ORDER**

2 Therefore, it is hereby **ORDERED** that the Commissioner's final decision
3 denying supplemental security income benefits is **REVERSED** and this case is
4 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
5 405(g).

6 Dated this 14th day of June, 2018.

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8 BENJAMIN H. SETTLE
9 United States District Judge
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